No. 13149

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

In the Matter of the Action Commenced in the United States District Court for the Eastern District of New York, Entitled

UNITED STATES OF AMERICA,

Plaintiff,

vs.

CANADIAN AMERICAN COMPANY, INC., a corporation, *et al.*,

Defendants.

D. B. SALISBURY,

Appellant,

vs.

JOSEPH F. RUGGIERI, as Receiver,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

Statement of Jurisdiction.

1. Statutory provision giving the District Court jurisdiction of the cause is:

United States Code, Title 28, Sec. 1331.

2. The requisite jurisdictional facts are set forth in the Order Appointing Receiver made by United States

District Judge, United States District Court for the Eastern District of New York, wherein it is set forth that plaintiff United States of America filed a verified complaint against the defendants pursuant to the provisions of Section 3678 of the Internal Revenue Code for the foreclosure of federal tax liens against the named defendants; that the Commissioner of Internal Revenue having filed his certificate pursuant to the provisions of Section 3678(d) of the Internal Revenue Code that the appointment of a receiver having the powers of a receiver in equity, is in the public interest. [Tr. 3-7.]

3. Statutory provisions as to jurisdiction of the Court of Appeals are: United States Code, Title 28, Section 1291 and Section 1292; Federal Rules of Civil Procedure 54(a). Appellee questions the jurisdiction of the court as to the issues presented by Appellant, as more particularly hereinafter set forth.

Statement of the Case.

In this proceeding the Appellee was appointed receiver of certain assets of defendants, which included property situated in the County of Los Angeles, State of California, belonging to certain of the defendants. [Tr. 3-7.]

Pursuant to said appointment, proceedings were taken [Tr. 8-12, 13-15] wherein certain real property situated in the City of Pasadena, County of Los Angeles, State of California, being the property known as 915-955-1003 Orange Grove Avenue, and being the property involved

in this appeal, was offered for sale by Appellee, as such receiver, at public auction after having received an offer from Appellant to purchase said real property for the sum of $60,110.00. [Tr. 15-28.]

On the 13th day of August, 1951, a minute order was made in the United States District Court, Southern District of California, Central Division, approving the sale of said real property to Appellant for the sum of $60,-110.00. [Tr. 30-31.] No formal order was entered thereon.

On the 15th day of August, 1951, Appellee received an offer from one Theodore J. Ticktin, to purchase said real property for the sum of $80,000.00. A motion was duly made by Appellee to set aside the minute order made on August 13, 1951. [Tr. 33-40.] The motion was granted and an order made and entered in said proceedings setting aside and vacating said minute order of August 13, 1951. [Tr. 46-48.]

Thereafter Appellee returned to Appellant, upon his demand the deposit of $6,100 made by him with Appellee at the time he made his offer to purchase said property [Tr. 67]; that Appellee's check for said amount payable to Appellant was delivered to Appellant by Appellee on the 4th day of September, 1951, and thereafter on the 29th day of October, 1951, Appellant cashed said check and received the proceeds thereof. (Please see Motion to Dismiss made by Appellee, and Affidavit in connection therewith dated November 9, 1951.)

Appellant filed his notice of appeal from said order vacating and setting aside said minute order of August 13, 1951, on September 26, 1951 [Tr. 58], and thereafter filed his bond on appeal in the sum of $250.00. [Tr. 99.] On October 17, 1951, Appellee filed a motion to require Appellant to file a supersedeas bond. [Tr. 61-70.] Said motion was granted on October 22, 1951 [Tr. 69-70], and an order was made and entered therein on the 25th day of October, 1951. [Tr. 70-71.] Appellant, on the 26th day of October, 1951, filed his notice of appeal [Tr. 72] appealing from said order requiring the filing of a supersedeas bond. Appellant has failed to file supersedeas bond and has failed to file cost bond in the sum of $250.00.

With respect to Appellant's offer to purchase said real property said offer was in writing and required him to deposit with Appellee the sum of $6,100.00, which sum was so deposited. Said offer [Tr. 21-24, Exhibit attached] provided in part as follows:

> "This offer is made subject to the conveyance of good and sufficient title, seller to furnish customary policy of title insurance at a liability of $60,110.00 showing property fee and clear of all encumbrances excepting general and special City and County taxes of the fiscal year 1951-1952 and conditions and restrictions of record, if any, as above provided.
>
> "Taxes of the fiscal year 1951-1952 to be prorated and paid by the buyer from date of confirmation of sale.
>
> "It is understood that this property is owned by Joseph F. Ruggieri, Receiver, in the matter of the

United States of America vs. Canadian American Co., Inc., *et al.,* and that the completion of this purchase is subject to the confirmation by the appropriate United States District Court, it being understood that you will take all necessary legal steps immediately to procure confirmation of sale at the earliest possible date.

"It is further agreed that in the event the title is not delivered to us by reason of failure of the Court to approve or by reason of the fact that some other purchaser shall have made a higher bid at a judicial sale or in accordance with the terms of any court order, or by reason of the unmarketable title, the obligation of the Receiver hereunder, or of the Offeror hereunder, shall both be cancelable and both shall be discharged of any liability on their part upon the return of the deposit made hereunder.

"Seller to furnish a contour survey by a licensed surveyor at his expense.

"If this offer is accepted, we shall take title in the names of D. B. Salisbury and Verne Salisbury, his wife, as joint tenants.

"It is a part of this offer that the completion of this sale and the delivery of the Title Policy of the subject property hereunder shall be completed on or before July 31st, 1951, or the deposit funds be returned to the offeror."

Summary of Argument.

Appellee contends that the District Court was within its jurisdiction to set aside any order made by it upon the facts of the record and as presented to the court as such. The amount of the offer of Appellant, to wit, $60,110.00, and that of Ticktin of $80,000.00, is of considerable difference and the Court has the right and it is its duty to consider such fact. The issue of the difference in the amounts is not the only issue upon which the Court determined to set aside its approval of Appellant's offer. The Court had before it the affidavit of Ticktin, whose offer of $80,000.00 was brought to the Court's attention. We are not confronted with the issue alone of whether the Court used discretion in setting aside an offer by reason of a larger offer being made, but have additional facts that were presented to the Court upon which the Court had a right to consider in exercising its discretion as to what justice warranted in the premises. The Court's comments at the time of its order made on August 13, 1951, with reference to Ticktin's phoning the Court's secretary, etc., appears sound and surely should be considered with reference to the issue here. [Rep. Tr., dated Aug. 30, 1951, pp. 3-6.]

The Court had a right to order Appellant to execute a supersedeas bond under the circumstances of this case. The factual situation being one where the Appellee could certainly sustain a loss in the event the order of the District Court was affirmed and the real estate involved in the proceeding would be opened to further order of sale,

wherein the public could have the opportunity to express itself as to what bid should be made for the property. The difference in the offer of the Appellant and of Ticktin of approximately $20,000.00 was considerable and the District Court was only endeavoring to protect everyone's rights in the premises until the issue was determined.

The Appeal From the Order Dated October 25, 1951, Being Order Requiring Appellant to Furnish $20,000.00 Supersedeas Bond.

Appellee believes the Court had authority to order Appellant to execute a supersedeas bond. The facts of the case warranted the Court in making an order protecting the rights of the parties. The law provides with reference to supersedeas bonds as follows:

> Rule 62(d) and Rule 73(d) and (e), *Federal Rules of Civil Procedure.*

Appellee contends the order of the Court is not an appealable one.

> *U. S. C. A.,* Secs. 1291, 1292.

We have the additional rule when the affirmance or refusal of an order made in the course of a proceeding would make no difference in respect to the controversy on the merits, the Appellate Court will not determine whether or not it was decided erroneously.

> *Chicago Great Western Ry. Co. v. Beecher,* 150 F. 2d 394, p. 398.

ARGUMENT.

I.

Appellant's Bid on the Proceedings Held August 13, 1951, Did Not Give the Appellant a Vested Right Recognized by Law. Neither the Appellant nor Appellee Became Subject to an Enforceable Contract.

In the case of *Butterfield v. Usher,* 91 S. Ct. Rep. 246-249, the facts appear to be quite similar to the issue presented here. In said case a decree was rendered in a suit in equity between one Johnson and Usher, directing a sale of certain lands, the property of Usher, on the 7th day of June, 1872. A sale of the property was made under said decree to one Butterfield, on September 30. The sale was reported to the Court on October 16, and on November 15 an order of confirmation was entered, unless cause to the contrary should be shown on or before December 10. Cause was not shown and thereupon on December 12 Butterfield paid the amount of his bid to the trustee, who made the sale, and received a deed to the property. An order was made ratifying and confirming the sale and approving the deed. On December 14 the order of December 12 was set aside on the petition of Usher and the court granted until December 21 to show cause against the confirmation. He appeared. On the 25th of January an order of confirmation was entered. From this order Usher appealed. On June 7 a decree was entered:

> "Upon the offer of the defendant making an advance on the sale heretofore made, it is ordered, adjudged and decreed by the Court this seventh day of June, A. D., 1873, that the sale heretofore made

in this cause by Francis Miller, Esq., trustee, be, and the same is hereby vacated and set aside. And it is further ordered that the said trustee may proceed to advertise and resell the property, and that the expenses of the cause heretofore incurred may be paid out of the proceeds to be realized from the sale hereby directed to be made. And it is further ordered that the money in the hands of the trustee be paid back to the purchaser, with interest thereon at the rate of ten percent per annum, to be paid by the defendant Usher, and to be deducted by the trustee from the proceeds to come into his hands from the further sale hereby ordered. And it is further ordered that the trustee, in reselling the property, put up the same at a price not lower than the sum realized at the former sale, together with the sum of five hundred dollars advance offered by George W. Hauptman."

Butterfield took an appeal from the decree and Usher alone appears as appellee. The court said:

"The decree here appealed from disposed finally of a motion made in the case, but not of the case itself. It simply set aside one sale that had been made, and ordered another. A decree confirming the sale would have been final. But this decree is analogous to a judgment of reversal with directions for a new trial or a new hearing, which, as has been often held, is not final. Where the practice allows appeals from interlocutory decrees, an appeal might lie from such a decree as this. Such was the practice in New York. 2 R. S. (N. Y.) 605, Secs. 78, 79; R. S. 178, Secs. 59, 62. Consequently it was said in Delaplaine v. Lawrence, 10 Paige 604, 'In sales by masters, under decrees and orders of this court, the purchasers who have bid off the property and paid their deposits in good faith are considered as having

> inchoate rights, which entitle them to a hearing upon the question whether the sales shall be set aside; and, if the court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal.' But our jurisdiction upon appeal is statutory only. If some Act of Congress does not authorize a case to be brought here, we cannot take jurisdiction. Appeals cannot be taken to this court from the Supreme Court of the District, except after a final decree in the case by that court. The decree in this case not being final, we have no jurisdiction."

We believe the above case is clearly in point with the issue here. In the case at bar we have a third party, Appellant. In the case referred to Butterfield was a third party.

It should be recognized by this court that no formal order was ever entered with reference to the minute order made on August 13, 1951.

The Court in its ruling in setting aside the purported order made on August 13, 1951, fully set forth its views with respect thereto. [Rep. Tr. dated Aug. 30, 1951, pp. 3-13.] It should be recognized by this court also that in the case at bar there was no spirited bidding such as occurred in the case cited extensively by Appellant, *In re Stanley Engineering Corp.,* 164 F. 2d 316. There were no bids except the one of the Appellant upon his offer. The Court so commented at the time of the sale proceedings. [Rep. Tr., dated Aug. 13, 1951, pp. 2-5.]

In the case at bar an order was entered on September 21, 1951, ordering the sale of the property involved in this matter on the 29th day of October, 1951, at 10:00 o'clock A. M. [Tr. 52-58.]

The sale of the property (had it been held) was open to the public where everyone had an opportunity, including the Appellant here, to bid. This was contrary to the order made in the case cited, *In re Stanley Engineering Corp.,* 164 F. 2d 316.

II.

Inadequacy of Price Is a Factor to Be Considered for a Motion to Set Aside Sale Proceedings.

Appellee does not question the law as to the inadequacy of price alone in setting aside the sale. That law is well established and recognized by Appellee. Appellee does contend, however, that the inadequacy of the price alone is not the only issue here. We do have the additional issue of Ticktin's calling the District Court's secretary the morning of the sale [Tr. 38-40]; we do have the remarks of the District Court with reference to said call. [Rep. Tr., dated August 30, 1951, pp. 3-6.] Appellee also calls the court's attention to Rule 60(b)(6) of the *Federal Rules of Civil Procedure.*

III.

Judicial Sales Will Be Set Aside Where Unfairness Is Apparent or There Was a Mistake in the Conduct of the Sale.

Appellee again refers to his previous assertions that the difference in the bids amounting to $20,000.00, together with the facts brought to the Court's attention arising out of Ticktin's phone call to the trial court's secretary and expressed in the Court's memorandum [Rep. Tr., dated Aug. 30, 1951, pp. 3-6], were sufficient facts to warrant the court in using its discretionary powers to set aside the sale proceedings.

IV.

There Was No Abuse of Discretion in Ordering the Sale Proceedings Set Aside.

Appellee contends the court did not abuse his discretion in ordering the purported sale set aside. As to what is discretionary is always a problem to determine in each factual situation and frequently causes considerable controversy. Appellee contends that the Court had discretionary authority to set aside the sale proceedings upon the facts presented to the Court. While the citation that is presented here does not pertain to a sale of property, we believe that the language used is solid and applies to any case where a higher court is passing upon a ruling of a lower court as to discretion. In *Delano v. Market St. Ry. Co.,* 124 F. 2d 965, 967 (9th Cir.), the Court said:

> "In a second sense, and the one most commonly meant in the use of the word in the law, 'discretion' is defined as: 'The power exercised by courts to determine questions to which no strict rule of law is applicable but which, from their nature, and the circumstances of the case, are controlled by the personal judgment of the court.' 1 Bouv. Law Dict., Rawles' Third Revision, p. 884. Judicial action—discretionary in that sense—is said to be final and cannot be set side on appeal except when there is an abuse of discretion. A common example is a court's ruling on the extent of cross-examination. Alford v. United States, 282 U. S. 687, 694, 51 S. Ct. 218, 75 L. Ed. 624. Discretion, in this sense is abused when the judicial action is arbitrary, fanciful or unreasonable, which is another way of saying that discre-

tion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion."

V.

A Subsequent Offer to Pay More Than the Price Previously Bid Should Be Considered on Motion to Set Aside the Sale Proceedings.

Appellee recognizes the rule with reference to setting aside judicial sales. However, in the instant case the Court not only considered the fact that the offer of Ticktin was almost $20,000.00, or one-third greater than that of Appellant, but also considered the fact that Ticktin had endeavored to communicate with the court in connection with making a higher bid. [Tr, 38-40; Rep. Tr., dated Aug. 30, 1951, pp. 3-6.]

VI.

Setting Aside a Judicial Sale Must Be Governed by the Facts in Each Individual Case.

In view of the increase in the bid of Ticktin and the factual situation with reference to his endeavor to make a higher bid, warranted the Court in using its sound discretion. It should be considered that there was no spirited bidding in the instant case and only one bid made, that being of the Appellant. The case of *In re Stanley Engineering Corp.,* 164 F. 2d 316, is different from the instant case, in that the court there determined only the issue of the increase of the bid, while here we have not only the increase of the bid, but also the additional fact that Ticktin, whose offer of $80,000.00 was made on

August 15, 1951, endeavored to communicate with the court during the sale proceedings, as has heretofore been referred to in this brief, and is shown not only by the affidavit of Ticktin, but by the Court's remarks in setting aside the proceedings of August 13, 1951. There is also the distinction in that in the Stanley Engineering case there was no re-advertising, so that the public could have an opportunity to bid. In the instant case the Court set aside the sale proceedings and ordered a re-offering and re-advertising of the property for sale. [Rep. Tr., dated Aug. 30, 1951, p. 6; Tr. 46-48, 52-57.]

VII.

The Authorities Were Correctly Applied by the Court in Setting Aside the Sale Proceedings.

The fact that the Court had charge of the sale of the property, placed it in a position to determine and use its discretion whether the prior proceedings should be set aside upon the facts presented. We do not believe the Court's discretion should be disturbed in this matter.

VIII.

The Court Properly Considered the Attempts of a Prospective Purchaser to Present His Better Bid in Determining Motion to Set Aside the Sale Proceedings.

It was the Court's duty to consider any and all bids upon the property and Ticktin's endeavor to communicate with the Court, as set forth in his affidavit, and the Court's

comments with respect thereto in setting aside the proceedings, certainly show that the Court considered the situation in a fair and proper manner and as such used its discretionary authority in making the order complained of. Appellant states that Ticktin learned the time of the sale from the advertisement, of which the last was published under court order on August 2, 1951, eleven days before Ticktin phoned the Court, the date of the sale on August 13, 1951. The fact that the notice of sale was legally published, certainly did not prevent the advertising of the property in addition to the legal advertising. The Court had before it the case of *Pewabic Mining Co. v. Mason,* 145 U. S. 349, and other authorities, and considered same in setting aside the sale and ordering a republication. [Rep. Tr., dated Aug. 30, 1951, pp. 3-6.]

IX.

The Order Made August 31, 1951, and the Order Made October 25, 1951, From Which the Appeal Is Taken, Are Not Appealable Orders.

The order entered August 31, 1951, is not an appealable order and the court has no jurisdiction. (*Butterfield v. Usher,* 91 U. S. Supreme Court Rep. 246-249.)

The order of October 25, 1951, *re* supersedeas bond is not an appealable order.

U. S. C. A., Secs. 1291, 1292.

X.

The Cause Has Become Moot, in That (1) by the Terms of the Offer of Appellant Dated May 21, 1951, as Extended by His Letter Agreement Dated July 26, 1951, All Rights and Obligations of Appellant to Appellee and All Rights and Obligations of Appellee to Appellant Expired; (2) the Demand of the Appellant for the Return of His Deposit of $6,100.00, the Return Thereof by Appellee to Appellant and the Acceptance by Appellant Thereof Constituted a Cancellation of the Offer of Purchase of Appellant and Terminated All Rights and Obligations of Appellant and Appellee Each to the Other.

The facts of the offer and obligations of the parties are set forth in full as exhibit attached to Petition for Order Authorizing Sale [Tr. 21] and again referred to in the affidavit in support of Receiver's Motion to Require Appellant to Furnish Supersedeas Bond. [Tr. 63-65.]

It is apparent from an examination of Appellant's offer that it was intended by him that unless the title to the property passed to him on or before August 31, 1951, he would not be bound to purchase the property. This did not occur. The property was not transferred and therefore under the specific provisions of his offer, to wit:

> "It is further agreed that in the event the title is not delivered to us by reason of failure of the Court to approve or by reason of the fact that some other purchaser shall have made a higher bid at a judicial sale or in accordance with the terms of any Court order, or by reason of the unmarketable title, the obligation of the Receiver hereunder, or of the Offeror hereunder, shall both be cancelable and both shall be

discharged of any liability on their part upon the return of the deposit made hereunder."

* * * * * * * *

"It is a part of this offer that the completion of this sale and the delivery of the Title Policy of the subject property hereunder shall be completed on or before July 31st, 1951, or the deposit funds be returned to the Offeror."

and the extension contained in his letter of July 16, 1951:

"Further in the event the court approves the sale of the subject property to us by midnight August 13th, we will allow a further period to midnight, August 31st, 1951, for completion of documentation and delivery of clear title."

Appellant was no longer obligated to purchase the property and any obligation of Appellee was extinguished.

Appellant stood on his rights under the terms of his offer, and demanded the repayment of his deposit of $6,100.00, which was returned to him by order of the Court.

This has been Appellant's position throughout this proceeding until this appeal and it will be noted, commencing page 10 of Reporter Transcript under date of August 30, 1951, by Mr. Brennan, Appellant's then counsel, the following:

"Mr. Brennan: I don't know whether your Honor is going on the assumption that $60,000 is still there. Now, I don't know what Mr. Salisbury's position will be. There was a condition placed upon the bid, that the bid would have to be accepted within a period of time and the escrow closed. I think there was that limitation upon the bid that was put in there and I doubt if he could be held to the $60,000 sale.

The Court: I don't intend to hold him. I intend this to be opened up on a new sale, and his $6,100 can be returned.

Mr. Silverstein: We have the check to return."

This check was delivered to Appellant and cashed by him.

The authorities are manifold to the effect that this Court will not pass on a moot question.

Mills v. Green, 159 U. S. 651, 40 L. Ed. 293;

Heitmuller v. Stokes, 256 U. S. 360, 65 L. Ed. 991;

Chicago Great Western Ry. Co. v. Beecher, 150 F. 2d 394;

Cover v. Schwartz, 133 F. 2d 541 at 546;

Lake Charles Metal Tr. Council, et al. v. Newport Industries, Inc., 181 F. 2d 820;

Brownlow v. Schwartz, 261 U. S. 216 at 217, 67 L. Ed. 621.

XI.

The Minute Order of the District Court Made August 13, 1951, Is Not Appealable, Hence the Appeal Taken Hereon to This Court by D. B. Salisbury on the 26th day of September, 1951, From the Order of the District Court Entered on the 31st Day of August, 1951, Vacating and Setting Aside Said Minute Order Is Not an Appealable Order.

This contention of Appellee needs no amplification.

See:

Butterfield v. Usher, supra.

Conclusion.

The orders made on August 31, 1951, and October 25, 1951, should be sustained.

Respectfully submitted,

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